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Issue date: 13Nov2002

Case No..: 2001-LHC-2223

OWCP No.: 18-69576

In the Matter of:

MARTHA ZAPATA,
Claimant

v.

UNITED STATES MARINE CORPS/MCCS,
Employer

and

CONTRACT CLAIMS SERVICES
Carrier

APPEARANCES:

JEFFREY M. WINTER, ESQ.,
On Behalf of the Claimant

CHRISTOPHER M. GALICHON, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (the "LHWCA" or "the Act"), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171, et seq., (the "NFIA"). The claim is
brought by Martha Zapata against the United States Marine Corps/MCCS ("USMC") and Contract Claims Services, Respondents. Claimant sustained an injury to her back and left side on December

15, 1998 during her employment with the USMC. A hearing was held on March 14, 2002 in San Diego, California, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Claimant's Exhibits Nos. 1-22; and

2) Respondent's Exhibits Nos. 1-12.

This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Claimant suffered an injury to her back and left side on December 15, 1998.

2) There was an employer/employee relationship between Respondent and Claimant at the time of Claimant's December 15, 1998 injury.

3) There is coverage under the Nonappropriated Fund Instrumentalities Act.

4) Claimant's average weekly wage at the time of her injury was $352.20.

5) Claimant was temporarily totally disabled from December 16, 1998 until December 20, 1998.

6) Claimant was temporarily totally disabled from July 21, 1999 until July 25, 1999.

7) Claimant was temporarily totally disabled from November 16, 1999 until February 10, 2000.

8) Claimant was permanently totally disabled from June 1, 2000 until September 11, 2000.

ISSUES

The unresolved issues in these proceedings are:

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[1] The following abbreviations will be used in citations to the record: CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

[2] TR. 5-7.

(1) Causation;

(2) Nature and Extent of Disability;

(3) Reasonable and Necessary Medical Benefits; and

(4) Attorney's Fees.

SUMMARY OF THE EVIDENCE

(5) TESTIMONY

Martha Zapata

Ms. Zapata testified she is 51 years old and began working as a housekeeper for the bachelors officer's quarters ("BOQ") of the USMC Miramar base[3] in the early 1980s. TR. 17-18. Her duties as a housekeeper included changing beds, moving beds, flipping mattresses, cleaning bathrooms, mopping floors, emptying the trash, taking linen up and down stairs, and vacuuming. TR. 18. In about 1990 or 1991, Ms. Zapata was promoted from housekeeper to supervisor. TR. 19. Her duties as a supervisor included handling time cards, scheduling, maintaining supplies, and overseeing the housekeepers. TR. 20. When the USMC took over the base in 1997 or 1998, Ms. Zapata's supervising duties changed to include assisting the housekeepers in cleaning. TR. 20-21; CX-10, p. 52.

On December 15, 1998, Ms. Zapata fell down the stairs while carrying linen. TR. 21. She injured her left arm, hip, back, and leg. TR. 23. Ms. Zapata testified that between December 1998 and July 1999, her physical condition worsened as she was increasingly required to assist the housekeepers in cleaning. TR. 25. She was first provided work restrictions from a doctor in July 1999 and missed about a week of work because no light duty was available. TR. 44. She thereafter did light duty work from July 1999 until the end of her employment with the USMC. TR. 44-45. The light duty work consisted

generally of folding towels, doing scheduling, and checking on housekeepers. TR. 57. Her employment with the USMC ended in October or November 1999, when her work became governed by outside contractors. TR. 24; CX-10, p. 53.

Ms. Zapata applied for a supervisor's position with the new contractors. TR. 35. She believed the supervisor position she was applying for was different than the supervising position she was holding because she was told the new job involved only administrative duties and not

[3] The Miramar base was a Navy base when Ms. Zapata began working, but changed over to the USMC in the late 1990s. TR. 23; CX-10, p. 52.

housekeeping and cleaning duties. TR. 35-36, 42-43. She was not offered the supervisor position. TR. 36. Instead, Ms. Zapata was offered a housekeeper position, which ultimately fell through because the new employer could not hire her under the work restrictions of her December 15, 1998 fall. TR. 36-37.

Ms. Zapata afterward worked at Park and Ride as a parking lot attendant. TR. 30. Although she had applied for a full-time position, she only worked three days a week because of the limited number of hours Park and Ride had available. TR. 30-31. She testified that she asked her supervisor for more hours on one occasion and that George Gill, of J.B. Gill & Associates,[4] had also called and inquired about the full-time work issue. TR. 31, 34-35. Ms. Zapata's hours with Park and Ride were to increase as more hours became available. TR. 31, 34-35. She was eventually let go by Park and Ride in about December 2000 because her services were no longer needed. TR. 32. At the time of her termination, Ms. Zapata was still working only three days a week. TR. 32. She assumed that the reason she was let go by Park and Ride was that she had called in sick too much due to the medication she was taking. TR. 48-49.

Ms. Zapata testified that she was working evening shifts at Park and Ride because those shifts were the only ones available at the time. TR. 49. She denied telling Joyce Gill, of J.B. Gill & Associates, that she could only work night shifts because she was caring for her children during the day. TR. 50. Ms. Zapata explained that she told Ms. Gill she would prefer working part-time but ultimately was seeking any positions available, including full-time work. TR. 50. Ms. Zapata testified that since her termination at Park and Ride, she has been seeking employment, mostly in the field of security after having obtained her security card. TR. 50.

Ms. Zapata currently has pain in her back, leg, hip, and groin due to her December 15, 1998 injury. TR. 39. She has pain everyday, and the pain is increased by movements such as bending, walking, standing up, and sitting down for long periods of time; i.e., 30 minutes to an hour. TR. 39. She testified that she can sit still without pain for 45 minutes before she has increased back pain. TR. 40.

Ms. Zapata testified that she could not now perform the regular duties of a housekeeper at the BOQ. TR. 40-41. She testified also that she is not capable of the duties of a supervisor position that would require assisting with housekeeping work or training new housekeepers. TR. 41-42. She opined that she was capable of administrative work but not intense manual labor. TR. 41.

Ms. Zapata testified that she receives compensation for in-home care of her aunt, who is disabled. TR. 26-27. Ms. Zapata received this compensation prior to her injury and continues to

[4] The United States Department of Labor referred Ms. Zapata to J.B. Gill & Associates for vocational rehabilitation services. TR. 111; CX-14, p. 81.

currently receive the compensation. TR. 27. Ms. Zapata testified that she was still caring for her aunt during the time she was unable to work at the BOQ, but that the care of her aunt was not what it was supposed to be. TR. 52. Ms. Zapata also receives funds for the care of two foster children, which will continue until each child's 18th birthday in about 2015 and 2016, respectively. TR. 28, 52. The foster care funds are for the needs of the children, and Ms. Zapata does not receive any tax documentation for these funds nor does she report the funds on her taxes. TR. 28. Ms. Zapata testified that she told Joyce Gill she occasionally took care of her grandchildren but was primarily responsible for her two foster boys. TR. 47. In her deposition on September 24, 2001, Ms. Zapata testified that she lived with her husband, her aunt, her two foster children, and a 22 year old daughter. CX-10, p. 50.

Gloria Emde

Ms. Emde is the Human Resource Specialist/Supervisor at the MCCS Miramar. TR. 95. She has been in her position for 16 years, first with the Navy and then with the USMC when the USMC took over the base in October 1997. TR. 96. Her general duties consist of staffing, basic counseling, benefits, workers' compensation, retirement, and health insurance, among other things. TR. 96.

Ms. Emde testified that Ms. Zapata was on light duty for a short period after the December 15, 1998 accident. TR. 106. Ms. Zapata returned to full duty a few days after the fall. TR. 107. She was then put on modified duty for a short period per her doctor's instructions and thereafter returned to full duty. TR. 101, 107. On cross-examination, Ms. Emde testified that she believed Ms. Zapata was on light duty in November 1999, that documentation existed indicating the occasions Ms. Zapata returned to full duty, and that all the documentation she had from Ms. Zapata's personnel file regarding when Ms. Zapata was on light duty or full duty was turned over to USMC's counsel. TR. 109-10.

Ms. Emde testified that Ms. Zapata did not accept employment from the new contractors because the offer was less than the pay she was getting and because there was no supervisory position offered from the new employer. TR. 108.

II. <u>MEDICAL EVIDENCE</u>: Testimony and Reports

John Cleary, M.D.

Dr. Cleary is a board certified neurological surgeon. TR. 60; CX-21. He first examined Ms. Zapata on November 16, 1999. TR. 61; CX-9, pp. 20-26. Ms. Zapata has had about 10 visits with Dr. Cleary. TR. 62. Dr. Cleary opined that Ms. Zapata's symptoms, tests, and examinations all were

consistent with her sustaining an injury as a result of her December 15, 1998 fall. TR. 65; CX-9, p. 25. Dr. Cleary testified that Ms. Zapata suffers from arthropathy or arthritis in her facet joints. TR. 65, 71. This condition was asymptomatic until it was lit up by her fall. TR. 65.

After Ms. Zapata's first visit with him, Dr. Cleary opined that Ms. Zapata was temporarily totally disabled. TR. 82; CX-9, p. 25. Dr. Cleary found on May 8, 2000 that Ms. Zapata's condition was permanent and stationary. CX-9, p. 35-37. Dr. Cleary's permanent limitations for Ms. Zapata are: no heavy lifting with a lifting limitation of 25 pounds, no repeated bending or stooping, no prolonged standing or sitting, and the ability to stand or sit at will during her workday. TR. 66; CX-9, p. 39.

Dr. Cleary does not believe Ms. Zapata is capable of performing the duties of a housekeeper nor the duties of a supervisor position that would require her to work as a housekeeper. TR. 67-68. Dr. Cleary testified that Ms. Zapata's caretaking duties for her aunt and children might affect his opinion depending on whether the caretaking involved heavy lifting and repeated bending and stooping. TR. 83-84. Dr. Cleary opined that Ms. Zapata was capable of occasional bending and stooping associated with caring for her aunt and children. TR. 84.

Dr. Cleary is currently prescribing Celebrex and Tylenol No. 3 for Ms. Zapata. TR. 69. According to Dr. Cleary, Ms. Zapata reported that during her employment with Park and Ride, she occasionally took Tylenol No. 3 and Celebrex due to her back pain. TR. 70; CX-9, pp. 40-41. Those medications made her drowsy, which was why she lost time from work at Park and Ride. TR. 70; CX-9, pp. 40-41. Dr. Cleary also recalls Ms. Zapata complaining of being cold or damp at night near the waterfront. TR. 70.

As to future medical care for Ms. Zapata's condition, Dr. Cleary testified that the solution for the most part was living with the pain and restricting activities. TR. 71. Ms. Zapata might be a candidate for surgery in the future but is not now a candidate. TR. 72.

Dr. Cleary testified that straight leg testing is a test for nerve entrapment and not a test for the joints of the spine. TR. 79. Dr. Cleary explained that someone with a facet joint condition may complain of pain during a straight leg test due to rotation of the pelvis that occurs when bringing up one's leg. TR. 79. Dr. Cleary testified that Ms. Zapata's foot is affected by her facet joint condition because of referred pain, pain caused when the body is confused as to the source of the pain. TR. 85-86.

Richard Greenfield, M.D.

Dr. Greenfield is a board certified orthopedic surgeon. TR. 132-33; RX-1, p. 1. Dr. Greenfield evaluated Ms. Zapata on February 7, 2002. TR. 133; RX-1, pp. 6-17. He estimates that the evaluation lasted about 40 to 45 minutes. TR. 147. He found no physiologic or anatomic reasons for Ms. Zapata's pain complaints. TR. 137, 143; RX-1, p. 15. According to Dr. Greenfield,

the results of Ms. Zapata's heel gait test and straight leg testing were inconsistent with her complaints. TR. 135-37; RX-1, pp. 14-15.

Dr. Greenfield testified that abnormalities in Ms. Zapata's lumbosacral spine are attributable to the normal aging process. TR. 138. Dr. Greenfield found some evidence of facet joint disease but opined that Ms. Zapata's pain is not caused by a facet joint condition. TR. 139, 147-48. Dr. Greenfield explained that the type of pain Ms. Zapata is complaining of, namely pain that goes down her leg, is usually associated much more with some sort of nerve root compromise. TR. 139. Dr. Greenfield testified that facet joint pain may cause referred pain around the back and gluteal area, but did not believe facet pain caused leg pain. TR. 140.

Dr. Greenfield testified that facet blocks should get rid of Ms. Zapata's pains but that the blocks Ms. Zapata had did not help her at all. TR. 146. Dr. Greenfield testified that he agreed with Dr. Markman's assessment of symptom maximization with respect to Ms. Zapata. TR. 143. Dr. Greenfield concurred with Dr. Markman's opinion that it would be difficult to be a primary caretaker of five children under six and not do repeated bending, twisting, pulling, and pushing. TR. 144-45.

Dr. Greenfield opined in his report that Ms. Zapata became permanent and stationary for her December 15, 1998 injuries in January 1999. RX-1, p. 15. He opined that Ms. Zapata's symptoms resolved and that she suffered no permanent residual disability nor deformity from her December 15, 1998 accident. RX-1, p. 15-16. According to Dr. Greenfield, Ms. Zapata could have continued doing her usual and customary job and is also fully capable of working as a parking lot attendant, hotel clerk, or machine operator. RX-1, p. 15. Dr. Greenfield also indicated that he felt any temporary total disability after January 5, 1999 was unrelated to the industrial accident on December 15, 1998, based on the fact that Dr. Markman had released Ms. Zapata at that point with no residual disability nor deformity. RX-1, p. 16.

Arnold G. Markman, M.D.

Dr. Markman began working with Kaiser Permanente in September 1978 and is currently the Chief of Occupational Medicine at Kaiser Permanente. RX-2, pp. 4-5. On December 17, 1998, Dr. Markman examined Ms. Zapata for her December 15, 1998 fall. RX-2, p. 7; CX-20, pp. 137-38. Dr. Markman opined that Ms. Zapata was not in severe pain and was weeping because of the demotion she had at work. RX-2, p. 7; CX-20, pp. 137-38.

Dr. Markman next examined Ms. Zapata on December 21, 1998, at which time he found that Ms. Zapata's injuries had resolved. RX-2, p. 8; CX-20, p. 139. Dr. Markman sent her back to her usual and customary work with no restrictions. RX-2, p. 8; CX-20, p. 139. On June 3, 1999, Ms. Zapata returned with complaints of increasing pain on the left side of her back and left buttock that was radiating down her left thigh. RX-2, pp. 8-9; CX-20, p. 141. Dr. Markman opined that

performing housekeeping work caused Ms. Zapata's pain to flare up. RX-2, pp. 9-10; CX-20, p. 142. He released her to full duty with no restrictions. RX-2, p. 11; CX-20, p. 142.

Dr. Markman evaluated Ms. Zapata again on June 29, 1999. RX-2, p. 12; CX-20, pp. 145-46. A June 22, 1999 MRI was reviewed, and Dr. Markman testified that the results were consistent with Ms. Zapata's pain complaints. RX-2, pp. 12-13; CX-20, pp. 145-46. Dr. Markman changed Ms. Zapata's status to temporary light duty because her subjective complaints were validated by the MRI scan. RX-2, p. 13; CX-20, p. 146.

Dr. Markman's next evaluation of Ms. Zapata occurred on July 20, 1999. RX-2, p. 15; CX-20, pp. 148-49. Dr. Markman found Ms. Zapata's subjective reaction during the exam to be inconsistent with his objective findings, indicating to him a myofascial-type pain[5] or general pain without any objective explanation. RX-2, p. 15. This finding occurred on subsequent visits also. RX-2, pp. 16-17, 19. Dr. Markman stated that a large group of patients, to which Ms. Zapata may belong, tend to magnify their symptoms due to stress and unconscious motives. RX-2, p. 31. Dr. Markman opined that Ms. Zapata was truly having pains, but that there was no anatomic justification for the amount of pain she was having. RX-2, p. 32.

Dr. Markman also testified that Ms. Zapata had facet blocks for her pain, but that she did not improve significantly. RX-2, p. 18-19; CX-20, p. 156. Dr. Markman opined that the facet blocks did not help Ms. Zapata because her pain was not coming only from her joints, but also involved a very significant emotional component. RX-2, p. 19.

Dr. Markman last visited with Ms. Zapata on October 21, 1999. RX-2, p. 20; CX-20, pp. 157-58. Dr. Markman's restrictions for Ms. Zapata on that date were: no lifting over 20 pounds, no bending, no climbing, no repeated pushing/pulling, and no twisting. RX-2, p. 21; CX-20, p. 158. These restrictions were given based on Ms. Zapata's symptoms, exams, and MRI; Dr. Markman testified that he gave her "the benefit of the doubt." RX-2, p. 22. Dr. Markman testified that assuming no change in Ms. Zapata's condition from the last time her saw her, he would have found her permanent and stationary within a month or two. RX-2, p. 22. Furthermore, Dr. Markman opined that assuming no change in her condition, he would give her permanent work restrictions, such as no repeated bending, pulling, pushing, twisting, and heavy lifting. RX-2, p. 23.

Dr. Markman testified that Ms. Zapata's symptoms were not consistent between his first visit with her and his last visit. RX-2, p. 24. Dr. Markman testified that patients typically are better at the end than at the beginning but that Ms. Zapata was worse at the end than at the beginning. RX-2, p. 24. Dr. Markman would not speculate on why this happened. RX-2, p. 24.

[5] Dr. Markman explained that myofascial pain is pain from the muscles and fascial layers that is not neurologic and which often involves a strong emotional component. RX-2, p. 29.

Dr. Markman opined that Ms. Zapata could be a parking lot attendant and hotel clerk. RX-2, p. 24. Ms. Zapata could also be a machine operator if she did not have to bend for prolonged periods of time nor lift the machine. RX-2, p. 24-25.

III. VOCATIONAL EVIDENCE: Testimony and Reports

J.B. Gill & Associates

Joyce B. Gill has been a vocational rehabilitation counselor since 1975and has been certified by the United States Department of Labor since 1991. TR. 111-12. Ms. Gill received a referral from the U.S. Department of Labor in this case for rehabilitation services with respect to Ms. Zapata. TR. 111; CX-14, p. 81.

Based on information from Ms. Zapata and the U.S. Department of Labor, Joyce Gill indicated that Ms. Zapata is taking care of five children under the age of seven. TR. 114; CX-14, p. 83. According to Ms. Gill, Ms. Zapata is able to perform all housework, cooking, and laundry, and her husband assists her with those activities. TR. 114-15; CX-14, p. 84. Ms. Zapata is not able to perform any gardening activities. TR. 128; CX-14, p. 84-85. Ms. Gill testified that during her questioning of Ms. Zapata, Ms. Zapata never mentioned any caretaking duties for a disabled aunt. TR. 116.

Ms. Gill testified that Ms. Zapata wanted to work evening or graveyard shifts, which limited the kind of work that could be identified. TR. 119. Ms. Gill testified that Ms. Zapata wanted to work night shifts because she was taking care of her children during the day. TR. 119-20. However, Ms. Gill also testified that the children were never really an issue and that the focus of her evaluation was to identify work for Ms. Zapata within the guidelines of the U.S. Department of Labor. TR. 125. Ms. Gill testified that she and Ms. Zapata were focusing on finding jobs for the daytime, and that the issue of evening shifts did not arise until jobs had been identified which would enable Ms. Zapata to work whatever shift she preferred. TR. 130.

Ms. Gill identified work for Ms. Zapata as a security guard and parking lot attendant/cashier. TR. 119; CX-14, p. 94. Ms. Gill testified that she identified eight available full time security guard positions, with wages ranging from $240.00 to $320.00 per week. TR. 121; CX-14, p. 94. The average weekly wage for these jobs was $283.20. CX-14, p. 94. Ms. Gill identified five available full time parking lot

attendant/cashier positions, with wages ranging from $240.00 to $280.00 per week. TR. 121-22; CX-14, p. 95. The average weekly wage for these jobs was $255.20. CX-14, p. 95. According to Ms. Gill's records, Ms. Zapata began working as a parking lot attendant three days a week at $6.00/hour for Park and Ride on September 8, 2000. CX-14, pp. 104-06.

Ms. Gill testified that with respect to security guard work, she arranged for Ms. Zapata a one day training program to obtain a temporary Guard Card. TR. 122; CX-14, p. 97. A temporary Guard Card would have allowed Ms. Zapata to perform security guard work during the 90 day period while her application was being approved for a permanent Guard Card. TR. 122; CX-14, p. 100. Ms. Zapata did not obtain a temporary Guard Card because of a 1988 DUI conviction, and therefore could not perform security work until she was approved for a permanent Guard Card after 90 days. TR. 122; CX-14, p. 100.

Ms. Gill also testified about a September 29, 2000 telephone conversation with Ms. Zapata, noted in Ms. Gill's September 30, 2000 report. TR. 120; CX-14, p. 106. Regarding that telephone contact, Ms. Gill's report notes that Ms. Zapata had indicated she was continuing to work three days a week at Park and Ride and did not prefer full time employment because she had gotten accustomed to the routine and was able to do more at home. CX-14, p. 106. In explaining this conversation, Ms. Gill testified that when there is no restriction against full time work, full time employment is sought. TR. 120. In Ms. Zapata's case, Ms. Zapata began her job at Park and Ride on a part-time basis. TR. 120. The gist of the September 29, 2000 conversation was that Ms. Zapata was still working part-time and had not approached her employer to increase her hours because Ms. Zapata preferred working part-time. TR. 120-21. Ms. Gill opined that Ms. Zapata did not want to work full time because she was caring for her children at home. TR. 121. Ms. Gill also indicated that her husband, George Gill, had contacted Park and Ride on September 12, 2000, and was told that all employees start on a part-time basis. TR. 129.

Ms. Gill also testified that on November 30, 2000, Ms. Zapata indicated that she had just completed a ten day vacation. TR. 123; CX-14, p. 110. Ms. Gill testified that it is not usual for an employee to take a vacation within 60 days of starting work. TR. 123. According to Ms. Gill, Ms. Zapata never indicated any difficulty with her job at Park and Ride, with taking medication and going to work, nor with working near the water. TR. 124.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION

The Nonappropriated Fund Instrumentalities Act provides that the LHWCA applies with respect to disability or death resulting from injury occurring to an employee of a nonappropriated fund instrumentality described by 5 U.S.C. § 2105(c). 5 U.S.C. § 8171. Section 2105(c) describes such employees as "paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces." 5 U.S.C. § 2105(c).

During the period at issue in this case, Ms. Zapata worked as a housekeeper and supervisor of housekeepers for a Naval and Marine Corps base. TR. 18-21. Based on this employment, the Court finds the LHWCA, as extended by the NFIA, is applicable to her case.

CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990).

In this case, the parties have stipulated that Ms. Zapata injured her back and left side on December 15, 1998 while she was employed by Respondent. TR. 5. The Court finds this stipulation is supported by sufficient evidence. CX-1; CX-3; CX-4; CX-6; CX-8; RX-7. Therefore, Ms. Zapata is entitled to the § 20(a) presumption.

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

The Court finds Respondents have presented evidence sufficient to rebut the § 20(a) presumption. According to Dr. Greenfield, Ms. Zapata suffered no permanent residual disability nor deformity from her December 15, 1998 accident and any temporary total disability she may have had after January 5, 1999 was unrelated to the industrial accident on December 15, 1998. RX-1, pp. 15-

16. Dr. Greenfield's opinion constitutes substantial evidence that Ms. Zapata's disability claim is not one arising out of or in the course of her employment. Therefore, the Court will resolve the issue of causation based on the evidence as a whole.

Contrary to Dr. Greenfield's opinion, both the treating physicians in this case opined that Ms. Zapata's current condition is related to her employment. Dr. Markman, Ms. Zapata's first treating physician, indicated that it is reasonably medically probable that Ms. Zapata's ongoing symptoms are the result of her December 15, 1998 fall. RX-2, pp. 9-10; CX-20, p. 142. Dr. Cleary opined that Ms. Zapata's symptoms, tests, and examinations all were consistent with her sustaining an injury as a result of the December 15, 1998 industrial accident. TR. 65; CX-9, p. 25, 38.

The Court finds that based on the evidence as a whole, Ms. Zapata has established that her disability is related to her employment with the USMC. First, Dr. Greenfield is much less familiar with Ms. Zapata's case than Drs. Markman and Cleary. Dr. Greenfield evaluated Ms. Zapata on February 7, 2002 for an estimated 40 to 45 minutes. TR. 133, 147; RX-1, pp. 6-17. This evaluation occurred over 3 years after the date of the injury at issue. Drs. Markman and Cleary, on the other hand, each evaluated Ms. Zapata about 10 times. TR. 62; CX-9; CX-20. Dr. Markman began evaluating Ms. Zapata two days after her December 15, 1998 fall. RX-2, p. 7; CX-20, pp. 137-38. Dr. Cleary began evaluating Ms. Zapata on November 16, 1999, over two years earlier than Dr. Greenfield's evaluation. TR. 61; CX-9, pp. 20-26.

Furthermore, Dr. Greenfield's opinion, that any temporary total disability after January 5, 1999 is unrelated to the December 15, 1998 fall, is based on the fact that Dr. Markman had released Ms. Zapata at that point with no residual disability nor deformity. RX-1, p. 16. Although Dr. Markman did so release Ms. Zapata at that point, Dr. Markman subsequently opined on June 3, 1999 that Ms. Zapata's disability is related to her employment. CX-20, p. 142. Therefore, whatever inference that may be drawn from Dr. Markman's release of Ms. Zapata on January 5, 1999 seems to the Court to be superceded by his subsequent opinion on June 3, 1999. Dr. Greenfield does not address this discrepancy, nor does Dr. Greenfield explain why he relied on Dr. Markman's January 5, 1999 release of Ms. Zapata but not on Dr. Markman's June 3, 1999 opinion regarding causation. Given his limited familiarity with the case and his precarious basis for opining that Ms. Zapata's current disability is unrelated to her employment, the Court

finds Dr. Greenfield's opinion is less persuasive than the opinions of Drs. Markman and Cleary. Based on the foregoing, the Court finds Ms. Zapata's December 15, 1998 injuries are related to her employment with the USMC.

NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America,

25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, Dr. Cleary found that Ms. Zapata's condition became permanent and stationary on May 8, 2000. CX-9, p. 35-37. Dr. Markman last visited with Ms. Zapata on October 21, 1999, and he testified that assuming no change in Ms. Zapata's condition from the last time her saw her, he would have found her permanent and stationary within a month or two. RX-2, pp. 20, 22; CX-20, pp. 157-58. The Court finds Dr. Cleary's date well-founded, and given the lack of an explicit date by Dr. Markman and the fact that Dr. Cleary's date is not unreasonable in relation to Dr. Markman's estimation, the Court will rely on Dr. Cleary's date. Dr. Greenfield opined that Ms. Zapata reached maximum medical improvement for her December 15, 1998 injuries in January 1999. RX-1, pp. 15-16. However, the Court finds Dr. Greenfield's opinion regarding maximum medical improvement unpersuasive for the same reasons the Court was unpersuaded by his opinion regarding causation.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the

existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

In this case, Dr. Cleary does not believe Ms. Zapata is capable of returning to her usual and customary position with the USMC. TR. 67-68. Likewise, the work status and work restrictions of Dr. Markman contemplate that Ms. Zapata is not able to perform her usual and customary work with the USMC. On June 29, 1999, Dr. Markman changed his work status for Ms. Zapata from full duty to temporary light duty. RX-2, p. 12-13; CX-20, p. 145-46. This temporary light duty status continued for the rest of the time Dr. Markman treated Ms. Zapata. CX-20, pp. 147-58. Dr. Markman last examined Ms. Zapata on October 21, 1999, and his restrictions for Ms. Zapata on that date were: no lifting over 20 pounds, no bending, no climbing, no repeated pushing/pulling, and no twisting. RX-2, pp. 20-21; CX-20, pp. 157-58. Dr. Markman opined that assuming no change in her condition since his last exam of her, he would give Ms. Zapata permanent work restrictions, such as no repeated bending, pulling, pushing, twisting, and heavy lifting. RX-2, p. 23. Dr. Markman's change of Ms. Zapata's work status from full to light duty and his opinion that Ms. Zapata requires permanent work restrictions support a finding that Ms. Zapata has established a *prima facie* case of total disability.

According to Dr. Greenfield, Ms. Zapata suffered no permanent residual disability nor deformity from her December 15, 1998 accident and is able to do her usual and customary job with Respondent. RX-1, p. 15-16. Dr. Greenfield's opinion is contrary to the opinions of both treating physicians in this case and his unfamiliarity with Ms. Zapata's case causes the Court to favor the opinions of Drs. Markman and Cleary. Therefore, based on the work status and work restrictions imposed by Dr. Markman, as well as

Dr. Cleary's opinion, the Court finds Ms. Zapata has established a *prima facie* case of total disability in that she is unable to return to her usual and customary employment with Respondent.[6]

[6] There is some evidence, mainly from Drs. Greenfield and Markman, that Ms. Zapata may be maximizing her symptoms and that her subjective complaints are inconsistent with objective medical findings. TR. 135-37, 143-145; RX-1, pp. 14-15; RX-2, pp. 15-17, 19, 24, 31-32. The Court's decision is not changed by this evidence. First, the parties do not contest the fact that Ms. Zapata was injured in a fall on December 15, 1998. TR. 5. The record clearly supports a finding that such an injury indeed took place. TR. 65; CX-1; CX-3; CX-4; CX-6; CX-8; CX-9, p. 25; CX-20, pp. 141-42; RX-1, p. 15; RX-2, pp. 8-10; RX-7. Therefore, fact of injury is not an issue in this case. Second, despite some discrepancy as to the degree of her symptoms,

The next issue is whether Respondent has presented evidence of suitable alternative employment so as to make Ms. Zapata's disability partial and not total. Joyce Gill, a vocational rehabilitation counselor referred to this case by the U.S. Department of Labor, identified alternative employment for Ms. Zapata as a security guard and parking lot attendant/cashier on July 31, 2000. TR. 119; CX-14, pp. 94-95. Ms. Gill identified eight available full time security guard positions, with wages ranging from $240.00 to $320.00 per week. TR. 121; CX-14, p. 94. Ms. Gill identified five available full time parking lot attendant/cashier positions, with wages ranging from $240.00 to $280.00 per week. TR. 121-22; CX-14, p. 95.

The Court finds these positions constitute suitable alternative employment for Ms. Zapata. Dr. Markman opined that Ms. Zapata could be a parking lot attendant. RX-2, p. 24. Ms. Zapata in fact worked as a parking lot attendant in the Fall of 2000 with Park and Ride. TR. 30; CX-14, pp. 104-06. According to Ms. Gill, Ms. Zapata never indicated any difficulty with her job at Park and Ride, with taking medication and going to work, nor with working near the water.[7] TR. 124. This employment was reported to Dr. Clearly, and the work was described by him as not physically stressful to Ms. Zapata. CX-There is some evidence, mainly from Drs. Greenfield and Markman, that Ms. Zapata may be maximizing her
symptoms and that her subjective complaints are inconsistent with objective medical findings. TR. 135-37, 143-145; RX-1, pp. 14-15; RX-2, pp. 15-17, 19, 24, 31-32. The Court's decision is not changed by this evidence. First, the parties do not contest the fact that Ms. Zapata was injured in a fall on December 15, 1998. TR. 5. The record clearly supports a finding that such an injury indeed took place. TR. 65; CX-1; CX-3; CX-4; CX-6; CX-8; CX-9, p. 25; CX-20, pp. 141-42; RX-1, p. 15; RX-2, pp. 8-10; RX-7. Therefore, fact of injury is not an issue in this case. Second, despite some discrepancy as to the degree of her symptoms, the weight of the evidence favors a finding that Ms. Zapata is indeed disabled. Dr. Cleary indicated that Ms. Zapata has permanent work restrictions of no heavy lifting with a lifting limitation of 25 pounds, no repeated bending or stooping, no prolonged

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the weight of the evidence favors a finding that Ms. Zapata is indeed disabled. Dr. Cleary indicated that Ms. Zapata has permanent work restrictions of no heavy lifting with a lifting limitation of 25 pounds, no repeated bending or stooping, no prolonged standing or sitting, and the ability to stand or sit at will during her workday. TR. 66; CX-9, p. 39. Likewise, despite some indication that Ms. Zapata's symptoms were not consistent with his objective findings, Dr. Markman's ultimate opinion is that Ms. Zapata requires permanent work restrictions, such as no repeated bending, pulling, pushing, twisting, and heavy lifting. RX-2, pp. 20-21, 23; CX-20, pp. 157-58. Although there is some discrepancy as to her subjective complaints, the discrepancy is not significant enough to change the Court's legal finding that Ms. Zapata is disabled at least to some extent.

[7] According to Ms. Zapata's testimony and Dr. Cleary's records, Ms. Zapata sometimes missed work because of her medication. TR. 48-49, 70; CX-9, pp. 40-41, 43. There is also some indication that Ms. Zapata's back symptoms may have been affected by the cold and damp work environment. TR. 70; CX-9, p. 43. However, the Court does not find these problems significant enough to prevent Ms. Zapata from working as a parking lot attendant. First, Ms. Zapata never reported any difficulty in those areas to Ms. Gill, her vocational rehabilitation counselor. Second, Ms. Zapata apparently did not report any difficulty to Dr. Cleary until 5 or 6 months after she had been fired, based on Dr. Cleary's reports. TR.32; CX-9, pp. 40-43.

standing or sitting, and the ability to stand or sit at will during her workday. TR. 66; CX-9, p. 39. Likewise, despite some indication that Ms. Zapata's symptoms were not consistent with his objective findings, Dr. Markman's ultimate opinion is that Ms. Zapata requires permanent work restrictions, such as no repeated bending, pulling, pushing, twisting, and heavy lifting. RX-2, pp. 20-21, 23; CX-20, pp. 157-58. Although there is some discrepancy as to her subjective complaints, the discrepancy is not significant enough to change the Court's legal finding that Ms. Zapata is disabled at least to some extent. 9, pp. 40-41, 43. Dr. Greenfield also indicated that Ms. Zapata is fully capable of working as a parking lot attendant. RX-1, p. 15.

Concerning a security guard position, Ms. Zapata testified that since her termination at Park and Ride, she has been seeking employment in the field of security, apparently having obtained her permanent Guard Card.[8] TR. 50. Ms. Zapata reported to Dr. Cleary that she was seeking such employment, and Dr. Cleary gave no indication that such employment was not suitable for Ms. Zapata. CX-9, pp. 41-43. Furthermore, based on Ms. Zapata's work restrictions and the duties of the security guard positions as described in Ms. Gill's report, the Court finds that Ms. Zapata should be able to perform the duties of a security guard.

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Although Ms. Zapata was fired from her job with Park and Ride and has reported that she has been unable to find employment with security firms, the Court nonetheless finds that the positions of parking lot attendant and security guard constitute suitable alternative employment for Ms. Zapata. Concerning her employment with Park and Ride, Ms. Zapata testified that she was let go by Park and Ride because her services were no longer needed, presumably because she had called in sick too much due to her medication. TR. 32, 48-49.

Assuming that Ms. Zapata was having a problem with her medication, Ms. Zapata never consulted Ms. Gill, her vocational rehabilitation counselor. In addition, Ms. Zapata apparently did not consult Dr. Cleary, her treating physician at the time, until well after she had been fired. TR. 124; CX-9, pp. 40-43. Furthermore, Ms. Zapata took a ten day vacation in November 2000, only a few months since she began working at Park and Ride. CX-14, p. 110. These facts indicate to the Court a lack of diligence on the part of Ms. Zapata. Despite having actually been fired from Park and Ride, the evidence weighs in favor

[8] Ms. Zapata was unable to obtain a temporary Guard Card that would have allowed her to perform security guard work during the 90 day period while her application was being approved for a permanent Guard Card. TR. 122; CX-14, p. 100. Ms. Zapata did not obtain a temporary Guard Card because of a 1988 DUI conviction, and therefore could not perform security work until she was approved for a permanent Guard Card after 90 days. TR. 122; CX-14, p. 100.

of finding that Ms. Zapata is able to perform the duties of a parking lot attendant, assuming a willingness to work on her part. Based on the foregoing, the Court finds that employment as a parking lot attendant is suitable alternate employment for Ms. Zapata.

As for employment as a security guard, Ms. Zapata has not sustained her burden of demonstrating that she has been diligent in her job search. Ms. Zapata did testify that she was seeking employment as a security guard, but was unable to get hired due to her injury. TR. 50. Her testimony is corroborated by Dr. Cleary's records. CX-9, p. 41. However, this evidence is not sufficient to support a finding that she has been diligent in her job search because the evidence is too general as to, *inter alia*, what positions she applied for, how many positions she applied for, and what occurred for each employer during her application process. Therefore, the Court finds that employment as a security guard also constitutes suitable alternate employment for Ms. Zapata.

The parties have stipulated that Ms. Zapata was temporarily totally disabled from December 16, 1998 until December 20, 1998, from July 21, 1999 until July 25,1999, and from November 16, 1999 until February 10, 2000. The parties further stipulate that Ms. Zapata was permanently totally disabled from June 1, 2000 until September 11, 2000.

There is sufficient evidence to support the stipulation that Ms. Zapata was temporarily totally disabled from December 16, 1998 until December 20, 1998. CX-20, p. 137-40. For the interval between December 20, 1998 and July 21, 1999, Ms. Zapata returned to her employment with the USMC either in a full duty or light duty capacity. CX-20, pp. 141-47. She therefore is not entitled to disability benefits for this interval.

Next, the stipulation that Ms. Zapata was temporarily totally disabled from July 21, 1999 until July 25, 1999 is supported by sufficient evidence. CX-20, pp. 148-49. After this period, Ms. Zapata returned to light duty work, and therefore she is not entitled to disability benefits again until November 16, 1999, as discussed below.

The parties stipulate that Ms. Zapata was temporarily totally disabled from November 16, 1999 until February 10, 2000, and this stipulation is supported by sufficient evidence. CX-9, pp. 20-31. Based on the opinion of Dr. Cleary, the Court finds further that Ms. Zapata's temporary total disability continued past February 10, 2000 until May 8, 2000. CX-9, pp. 32-39. On May 8, 2000, Ms. Zapata reached maximum medical improvement, and she became permanently totally disabled. CX-9, pp. 35-39.

On July 31, 2000, Ms. Gill identified suitable alternate employment for Ms. Zapata. However, the parties have stipulated that Ms. Zapata was permanently totally disabled during the period of her vocational rehabilitation from June 1, 2000 until September 11, 2000. TR. 6. The Court accepts this stipulation, except that Ms. Zapata's permanent total disability should have ended on September 8, 2000, the date she became employed at Park and Ride, rather than September 11, 2000. CX-14. Therefore, beginning September 8, 2000, Ms. Zapata has been permanently partially disabled.

WAGE-EARNING CAPACITY

The determination of post-injury wage-earning capacity in cases of permanent partial disability is governed by §§ 8(c) and 8(h) of the Act, 33 U.S.C. §§ 908(c) and 908(h). La Faille v. Benefits Review Bd., 884 F.2d 54, 60, 22 BRBS 108, 118 (CRT)(2nd Cir. 1989). Because Claimant's injury is not of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20), it falls under § 8(c)(21). 33 U.S.C. §§ 908(c)(1)-(21). Under § 8(c)(21), compensation is set at 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity, as determined pursuant to § 8(h) of the Act. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); 33 U.S.C. § 908(c)(21).

Section 8(h) provides in part that post-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Bethard, 12 BRBS at 693; 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Court may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, §§ 8(c)(21) and 8(h) of the Act require that the wages earned in a post-injury job be adjusted to account for inflation in order to represent the wages that job paid at the time of the claimant's injury, insuring that wage-earning capacity is considered on an equal footing with the determination under § 10 of average weekly wage at the time of the injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard, 12 BRBS at 695; La Faille, 884 F.2d at 61, 22 BRBS at 120. A court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In this case, Ms. Zapata worked at Park and Ride on a part-time basis despite having no restriction against full time work. TR. 120-21; CX-9; CX-14, p. 95. According to Ms. Gill, Ms. Zapata indicated that she preferred working only part-time while at Park and Ride because she had become accustomed to the routine and was able to do more at home. TR. 120-21; CX-14, p. 106. Because Ms. Zapata had no work restriction against full time work and worked part-time by preference, the Court finds that her part-time earnings at Park and Ride do not fairly and reasonably represent her post-injury wage-earning capacity.

The Court finds Ms. Zapata's residual wage-earning capacity is reasonably represented by the average wage of the security guard and parking lot attendant positions identified by Ms. Gill. Based on Ms. Gill's July 31, 2000 report, the average weekly wage for the security guard positions she identified was $283.20, and the average weekly wage for the parking lot attendant jobs was $255.20. CX-14, pp. 94-95. The average of these two figures equals $269.20 per week.

The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Quan v. Marine Power & Equipment Co., 30 BRBS 124, 127-28 (1996); Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). Between December 15, 1998, the date Ms.

Zapata was injured, and July 31, 2000, the date Ms. Gill identified the alternate employment, the NAWW increased by 3.39%. United States Department of Labor, Employment Standards Administration (October 21, 2002). Adjusting the July 31, 2000 security guard and parking lot attendant wages with this in mind, the Court finds that Ms. Zapata's residual wage-earning capacity at the time of her injury was $260.07 per week.

AVERAGE WEEKLY WAGE

The parties have stipulated that Ms. Zapata's average weekly wage is $352.20 per week. The Court finds this stipulation is supported by sufficient evidence. CX-15.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary

only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g, 6 BRBS 550 (1977).

Having demonstrated that her back and left side injuries were caused by her employment at USMC, Ms. Zapata is entitled to past and future compensable medical benefits arising from those injuries.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from December 16, 1998 until December 20, 1998, based on an average weekly wage of $352.20.

2) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from July 21, 1999 until July 25, 1999, based on an average weekly wage of $352.20.

3) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from November 16, 1999 until May 8, 2000, based on an average weekly wage of $352.20.

4) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from May 9, 2000 until September 7, 2000, based on an average weekly wage of $352.20.

5) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from September 8, 2000 and continuing, based on an average weekly wage of $352.20 and reduced by her residual wage-earning capacity of $260.07.

6) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

7) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

8) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, with interest in accordance with Section 1961, which are the result of Claimant's December 15, 1998 injuries.

9) Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge